No. 43691-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DIANE DUMOND and GREG DUMOND,
single individuals,

Appellants,

v.

VIETNAMESE BAPTIST CHURCH OF TACOMA, INC, a Washington Corporation; and CHARLES L. KELLY and "JANE DOE" KELLY, as a martial community

Respondents.

BRIEF OF RESPONDENTS

Stanley J. Rumbaugh, WSBA No. 8980
Rumbaugh Rideout Adkins & Wallace, PLLC
820 A Street, Suite 220
P.O. Box 1156
Tacoma, WA 98401
Telephone: 253-756-0333
Fax: 253-756-0355

TABLE OF CONTENTS

Identification of the Properties and Parties. 2

II. Description of Disputed Property 3

III. Statement of the Case 4

IV. Argument. 10

a. Standard of review is whether the trial court's ruling is supported by substantial evidence in the record. 10

b. The Dumonds have failed to present evidence sufficient to establish all elements of the legal test for prescriptive easement. 13

i. Permissive use is inferred where a property owner allows shared use of an existing right of way 14

ii. Evidence of a relationship between property owners is not necessary to infer permissive use. 18

iii. The Dumonds cannot establish a claim of right independent of public use of the alleged alley 19

iv. The facts of this case support the trial court's conclusion that use of the land established only a reasonable inference of neighborly accommodation. 20

v. *Drake* is distinguishable because it involves overt acts of adversity and does not address public use. 22

vi. Subjective belief of a publically owned alley is irrelevant. 25

c. Kelly and the Church are entitled to damages for the destruction of their property by Greg Dumond. 26

d. Kelly and Church are entitled to judgment clearing title and a permanent injunction to prevent the Dumonds from using their property 27

e. Kelly and the Church claim attorney fees and costs in defending this appeal from the Superior Court. 27

V. Conclusion. 28

TABLE OF AUTHORITIES

Anderson v. Secret Harbor Farms, 47 Wn.2d 490, 495, 288 P.2d 252 (1955)..... 11

Burnside v. Simpson Paper, 123 Wn.2d 93, 108, 864 P.2d 937 (1994) 12

Cuiller v. Coffin, 57 Wn.2d 624, 358 P.2d 958 (1961)..... 11-18, 22, 25

Drake v. Smersh, 122 Wn. App. 147, 89 P.3d 726 (2004). ... 11, 14, 17, 18, 22-24

Dunbar v. Heinrich, 95 Wn.2d 20, 622 P.2d 812 (1980). 24, 25
Granston v. Callahan, 52 Wn. App. 288, 749 P.2d 462 (1988). 18

Hendrickson v. Sund, 105 Wash. 406, 410, 177 P. 808 (1919). 19

Imrie v. Kelly, 160 Wn. App. 1, 5, 250 P.3d 1045 (2010)..... 16, 17, 24, 25, 29

Kunkel v. Fisher, 106 Wn. App. 599, 23 P.3d 1128 (2001). 11

Lingvall v. Bartmess, 97 Wn. App. 245, 982 P.2d 690 (1999).....19

Nordstrom Credit, Inc. v. Department of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993). 12

Roediger v. Cullen, 26 Wn.2d 690, 179 P.2d 669 (1946)..... 15, 25

Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 23 P.3d 520 (2001).....11

Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)..... 12

Wilson & Son Ranch, LLC v. Hinz, 162 Wn. App. 297, 305, 253 P.3d 470 (2011). 12

STATUTES

RCW 4.84.250 ..... 27, 28, 30

RCW 4.84.290 ..... 27, 30

RULES

RAP 18.1 (a) and (b). 28, 30

Respondent's Position on Appellant's Issues

Pertaining to Assignment of Error.

1. Substantial evidence supports the trial court's determination that Plaintiffs failed to satisfy the statutory requirements of prescriptive easement acquisition.

(Assignment of Error 1-5.)

2. Substantial evidence supports the trial court's ruling that Respondents, and each of them, have clear title, unburdened by prescriptive easement, to the property in dispute, and that Appellants are permanently enjoined from use of the property which is the subject of the litigation.

(Assignment of Error 6-7.)

3. The trial court's award of damages and entry of judgment against Gregory Dumond related to fence destruction is supported by substantial evidence in the record.

(Assignment or Error 8.)

I. Identification of the Properties and Parties.

This cases involves an alleged prescriptive easement asserted over property owned by the Defendants below, Charles Kelly and "Jane Doe" Kelly, and the marital community (hereafter Kelly), and Vietnamese Baptist Church of Tacoma (hereafter "Church"). Charles Kelly owns the properties located at 3415-3419 South 62nd Street. Defendant below Vietnamese Baptist Church of Tacoma (hereafter "Church") owns the property located at 6042-6048 South Warner Street. Mr. Kelly acquired his interest in the property in June 2006 (Ex. 1) and the Church acquired its interest in December 2003 (Ex. 7).

There properties are located on the 6000 block of South Warner Street ("Block"), which runs from South 60th Street to the north, down to South 62nd Street at the south end. The Church and Kelly properties collectively make up the southern-most edge of the Block, adjacent to South 62nd Street. Ex. 5.

The Plaintiffs below Diane and Greg Dumond (hereinafter "Dumond") have a joint interest the property located at 6032 South Warner Street, Tacoma, Washington with their brother Darrell Dumond who is not a party to this suit. Report of Proceedings at 18 (RP 18). Diane and Greg Dumond acquired their interest in the property as inheritance

from their parents Cecil and Margaret Dumond. RP 18. Cecil and Margaret Dumond originally purchased the property in 1959. Based on the testimony of Greg and Diane Dumond, it is believed that at the time their property was acquired it had a single family dwelling which was torn down and replaced with a new single family dwelling shortly after the 1959 purchase (RP 20-1). This property is on the same block as the properties owned by Kelly and the Church, on the same side of the street as the church, but three parcels north, and on the opposite side of the street from Kelly. Ex. 5.

II. Description of Disputed Property.

The Dumonds allege that an alley exists in the middle of the block described above and depicted in Ex. 5. This alley is alleged to exist in between the parcels on the Block located on South Warner Street and those located on Puget Sound Avenue, based on prescriptive use.

The alley alleged to exist by the Dumonds passes over property owned both by Kelly on the east and the Church on the west. The official plat map of the area confirms no dedicated alley ever existed on the Block. Ex. 5. This fact is undisputed.

The alleged alley is depicted on an altered plat map for illustrative purposes in Ex. 24-29. The deeds to the Kelly and Church properties make no reference to any alley located on the Block. Ex. 1; 7,

nor does the title insurance policy reflect any easement or alley. Ex. 1. There is no evidence in the record of any historical judicial recognition of an alley at any prior time.

Upon purchase of the property, in 2003, the title report obtained by the church reflected no alley or right of way in the disputed area. (RP 214). When the Kelly's purchased their property in 2006, the title report was similarly devoid of any encumbrance or alley in the area under dispute. (RP 189) Mr. Kelly testified that, on visual inspection, the disputed area was grown up with vegetation, and did not provide him with notice of any evidence of regular use for access by anyone. (RP 191).

III. Statement of the Case.

At the time that Cecil and Margaret Dumond built their new home around 1959 there appeared to be an area of common use at the rear of the property. (RP 20-21). This alleged alley was used by city garbage trucks on a weekly basis until about 1978. (RP 32). In the 1960's and 1970's it was also used by other residents of the block, and by non-residents, whose mutual use was consensual. (RP 31). Several current or former owners of property on this block believed that a public alleyway existed. (CP 442-3). This included Greg and Diane Dumond. (CP 442-3).

Diane Dumond testified that she periodically used the alleged alley

for access between 1980- and 2008. (RP 76). This testimony is called into question by other witnesses however. Chuck Kelly purchased his property in 2006, and went to work constructing a new triplex within 30 days of the purchase. (RP 192). He was on the premises virtually every work day between June of 2006 and September of 2007 (RP 192), and never saw anyone drive down the area in question during that time. (RP 195). Mr. Kelly did not see anyone driving the area during his frequent visits to the property to mow or do maintenance after construction was complete. (RP 195).

Darlene Mundy, who lives next door to the Dumonds, resided on her property since 1995. (RP 115). Ms. Mundy testified she removed an old car from her garage through the alleged alley on one occasion (following her husband's death), though she parked in the front of the house. (RP 125). She had appliance deliveries through the alleged alley a couple times. (RP 122-23). Ms. Mundy never saw any other vehicle traffic during the period of time she lived in her house. (RP 122). In particular, she never saw Appellant Diana Dumond drive in the disputed area before the fence was torn down in 2010. (RP 120; 127).

Mr. Bob Kahl lived on the Puget Sound facing side of the alleged alley since 2006. (Dep. Kahl p. 6.) He drove in the alleged alley once after 2006 to remove a trailer. This occured after asking permission from church members, who readily granted him permission to pass.

(Dep. Kahl, p. 14-15.) Mr. Kahl never saw anyone using the alleged alley the entirety of the time he lived at the South Puget Sound address, until Mr. Dumond went in the area to cut brush that had grown up. (Dep. Kahl, p. 19.)

It is clear from the record that at one time this alleged alley was, in several decades past, used by residents of the block on a more frequent basis than in the past couple decades. It is equally clear that the block was, several decades past, used by non-residents. The evidence of this usage is generally detailed in the Brief of Appellant and will only be briefly summarized here.

Ron Brown testified before the lower court that he did not own property on the block in question. (RP 128). However, Mr. Brown nevertheless used the passage to travel south to and from his home located on the block immediately to the north.

Mr. Brown testified that it had been between 10 and 20 years since he traveled the alleged alley. (RP 135). Mr. Brown also testified that the alleged alley became a significant crime problem, noting "...we had a big prostitution problem where they were using the alley and what not." (RP 135).

Louis Rougutt also testified that his father operated a TV repair shop out of his family's rear facing garage. (RP 151-2). He further testified that customers of the business used the passage to access the

business, but the business closed in 1965. (RP 153). Mr. Rougutt last used it in 1974, except for one occasion in 1992 after the death of his father. (RP 154).

The evidence presented by plaintiff indicates that all homeowners on the block consequently used the alleged alley, including the predecessors in interest to Kelly and the Church. The access was never denied or impeded until 2006. (passum. See, e.g. RP 93).

On questioning from the court, Mr. Rougutt stated that the first time the alleged alley was blocked to prevent people from using it freely was four or five years ago. (RP 155).

Despite the lack of a designated alley, the Dumonds made the choice in 1959 to build a rear facing garage. (RP 21; 25-26). As many as nine other properties on the block had rear-facing garages along the passage in the 1950's and 1960's. (RP 94). Over the years the number of people actually using a rear facing garage had dwindled to one. (id). That use is the Plaintiff, Dumond. *Id.*

The Brief of Appellant also acknowledges the decrease in the mutually permissive use of the alleged alley by those living adjacent to it. Dwindling use started in the 1970's and continued until permission was withdrawn, and the way blocked, in 2006. (RP 93-94). As a consequence of this lack of use, the alleged alley began, in the 1990s, to look increasingly overgrown according to testimony of Plaintiff Diana

Dumond. (RP 93-94).

By the time Mr. Kelly purchased his property in 2006, the alleged alley had been fenced off near the northern end and was overgrown throughout. (RP 191). At the time he purchased his property, Mr. Kelly did not believe the area was used for anything other than back yards, or an area where residents dumped grass clippings. (RP 191-192).

The first indication of objection to the use of the alleged alley in the middle of the block was in 2006 when a non-party owner of the northern most property constructed a fence blocking the northern entrance to the passage. (RP 93). In 2008 both the Church and Kelly built a fence across to the edge of their respective property lines. (RP 196). This fence blocked all access to the alleged alley. (RP 58-9). In 2010 Greg Dumond, without permission, destroyed both of these fences so that he could access the rear of his property. (RP 63-4, 82). At the time of this self-help remedy, Mr. Dumond knew the area was not dedicated as an alley, and that the Church representatives vigorously challenged, verbally, his destruction of their fence. (RP 63-64).

Church leaders (RP 215) and Mr. Kelly, on property acquisition, examined title documents and title insurance policies (RP 189) to ensure the absence of any lien or encroachments on their land. Exhibits 2, 5, and 7.

The record clearly depicts the fact of declining use of the land

in question, over the years. Ultimately, it was the increase of criminal and unsavory behavior in the area that provoked withdrawal of the permission to pass by some of the affected residents. In addition to the prostitution problem discussed by Mr. Brown (RP 135), a persistent problem with illegal dumping had developed. Ms. Mundy had to repeatedly remove garbage and dumped furniture. (RP 121-122). Mr. Kelly ultimately put his fence up, in part, to stop illegal dumping. (RP 195-196). Mr. Nguyen testified the Church also erected its fence in response to dumping. (RP 217).

Additionally, Mr. Kelly was concerned about security issues at his triplex, actually located the southwest edge of the area in question, with a South 62nd Street address. (RP 196). After Mr. Dumond unlawfully destroyed Mr. Kelly's fence, Mr. Kelly experienced an attempted break in at his triplex, which was reported to police. (RP 197). Mr. Kelly's fence was erected at the surveyed boundaries of his property. RP 203. Exhibit 2. It is also undisputed that Mr. Kelly's fence did not even block access to the disputed area, as it ended about 25 feet south of the Church's property. (RP 203; 205). Mr. Kelly's fence is the darker of the fences depicted in Exhibit 2. (RP 193). The Church leaders discussed the property boundaries and checked the surveyed corner markers before placing their fence in the disputed area. (RP 203-205).

Finally, Respondent notes for the court that Finding of Fact 18,

establishing a cost of fence repair at $2,941.80, with a potential $294.18 discount is un-rebutted in the record, and stands as the sole evidence of the cost of repair of damages done by Appellant Greg Dumond. See Exhibit 4.

After trial on the merits before the Honorable Edmond Murphy, the Superior Court issued findings of fact consistent with the facts described above. CP 455-459. Based on these findings of fact, Judge Murphy concluded that there was a tacit agreement among the residents of the 6000 block of South Warner St. to keep the passage open for use by the property owners. CP 457. Based on the permissive nature of the prior use, the Court correctly ruled that the Dumonds had failed to establish the five necessary elements of a prescriptive easement. Specifically, the Court ruled that the Dumonds had failed to prove that their use was adverse to the predecessors in interest of Kelly and the Church. CP 446. The Court then issued judgment in favor of the Defendants below, issuing a permanent injunction prohibiting use of the passage by the Dumonds and ordering payment of $2,647.62 in damages for the destruction of the fences. CP 455-459.

IV. Argument

a. Standard of review is whether the court's ruling is supported by substantial evidence in the record.

Any review of this case must be guided by the principle that prescriptive rights are disfavored in law, and any party seeking such a

right bears the burden of proof. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 23 P.3d 520 (2001). To establish a prescriptive easement, the Dumonds must prove five separate elements: open and notorious use of servient land, over a uniform route, continuous and uninterrupted for at least 10 years, adverse to the owner of the land and with the knowledge of the owner at a time when he or she is able to assert his or her rights. *Kunkel v. Fisher*, 106 Wn. App. 599, 23 P.3d 1128 (2001). The trial Court found that four of these elements had been established by the Dumonds. This appeal concerns absence of the the fifth requirement, adverse use. CP 446.

Under Washington law, whether use is adverse is ordinarily a question of fact. *Drake v. Smersh*, 122 Wn. App. 147, 89 P.3d 726 (2004). Adverse use may be decided as a matter of law only where the essential facts are not in dispute. *Id.* The Court in *Cuillier v. Coffin*, 57 Wn.2d 624, 628, 358 P.2d 958 (1961), applied this rule holding:

> The trial court was clearly entitled to find, from all of the circumstances, the ultimate fact that the defendants' use of the road was permissive and not adverse. Whether or not we would have made the same finding (and we would) is not material; the finding of the trial court on factual issues will not be disturbed where credible evidence and the legitimate inferences therefrom sustain it.

(Citations omitted).

The finding here by the Superior Court of a tacit permissive use agreement among effected property owners, and the resulting permissive

use should not be disturbed as long as there is "credible evidence and a legitimate inferences therefrom" to support the finding.

Ordinarily, such finding of fact will not be disturbed on appeal unless it is not supported by substantial evidence. *Wilson & Son Ranch, LLC v. Hinz*, 162 Wn. App. 297, 305, 253 P.3d 470 (2011). *Nordstrom Credit, Inc. v. Department of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993). "The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence." Substantial evidence requires only a "sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true." *Id.* As long as this standard is met, an appellate court will not substitute its judgment for that of the trier of fact. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Even if the Appellate Court might have ruled differently at trial, it should not substitute its judgment for the trial court. *Cuillier* (supra).

This deference to the trial court, acting as trier of fact, is consistent with the long established rule that the credibility of evidence is a determination solely for the trier of fact. Unless the decisions are clearly unsupported by substantial evidence, the trier of facts findings of fact should be enforced by the appellate court. *Burnside v. Simpson Paper,* 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

In the case at bar, there is no evidence of any hostile use of the

property in question until 2006, rendering the trial court's decision wholly in conformity with the evidence produced at trial.

b. The Dumonds have failed to present evidence sufficient to establish all elements of the legal test for prescriptive easement.

The Superior Court found that the Dumonds satisfied only four of the five elements of a prescriptive easement. CP 446. The only contested issue is whether the use of the alleged alley by the Dumonds was permissive or adverse.

In order to meet the element of adverse use, the Dumonds must present evidence sufficient to show that previous use was not permissive. It is clear under Washington law that unchallenged use for the prescriptive period alone is wholly insufficient to establish adverse use. *Cuillier v. Coffin*, 57 Wn.2d 624, 358 P.2d 958 (1961) (unchallenged use *together* with other circumstances may warrant inference of adversity).

> If one, for his exclusive use, makes a road across the land of another and uses it for the prescriptive period, it is much more persuasive of adverse use than if the claimant had merely used a road for the prescriptive period, which had been used first by the owner of the property and who continued, at all times, to use the road for his own purposes. Indeed, the latter circumstance, we have consistently held, justifies the inference that such use by the nonowner is with the permission of the owner. It signifies only that the owner is permitting his neighbor to use the road in a neighborly way.

Cuillier, *Id.* at 627.

Adverse use requires that the party seeking an easement use the property as the true owner would, entirely disregarding the claims of others, asking permission from no one and using the property under a claim of right. *Drake*, 122 Wn. App. at 155. However, Washington Courts have a long history of implying permissive use in cases where an owner allows general use of his own right of way. *See Cuillier*, 57 Wn.2d 624.

i. Permissive use is inferred where a property owner allows shared use of an existing right of way.

The Washington Supreme Court addressed a very similar case in *Cuillier v. Coffin.* In that case the property in question was a roadway along the south end of the plaintiff's orchard. 57 Wn.2d at 625. Later, when the plaintiffs decided to extend their orchard into the roadway, they sought an injunction to prevent the defendants continued use of the road in the operation of the ranch to the north. *Id.* The court held

> The rule is stated, as follows:
>
> > Where the way in question is shown to have been opened or maintained by the owner of the soil for his own benefit, and the claimant's use of it appears to have been merely in common with him, no presumption arises that the latter's use of it was adverse or under a claim of right. In the absence of additional circumstances pertaining to the origin or nature of the claimant's use, and expressing a purpose to impose a separate servitude upon the land, the use is presumed to be permissive only.

Id. at 627-8 (citation omitted). The court made it clear that a determination of adversity is a fact intensive inquiry which requires consideration of all circumstances surrounding the initial use of the roadway, in addition to the actions of each party. As earlier discussed, only if there is no substantial evidence to support the trier of fact's findings, should those findings be disturbed. Here, the trial court had clear evidence that the "adversity" element did not begin until 2006, and that finding should not be disturbed.

The facts of the *Cuillier* decision are indistinguishable from the facts of the present case. Here, the Dumonds purchased a lot surrounded by neighbors, all of whom used, and mutually allowed the area in question to be used as a passage through the middle of the block. CP 442-3. The alleged alley was used by most property owners on the block, including the predecessors in interest to Charles Kelly and the Church. When the Dumonds arrived at their property, they began using the area in the same manner as it was used by the other property owners. As in *Cuillier*, no evidence is presented regarding the origin of the alleged alley, which might imply an intent "to impose a separate servitude upon the land." The Dumonds simply purchased a lot and found a pre-existing passage available for use by the various residents of the block. Thus the use is "presumed to be permissive only."

This result in *Cuillier* has been confirmed in a multitude of similar cases. In *Roediger v. Cullen*, 26 Wn.2d 690, 179 P.2d 669 (1946), the

court held that neighbors' use of a pathway to beach across the owner's unenclosed land did not establish a prescriptive easement, even though the neighbor never asked permission to pass.

> The law should, and does encourage acts of neighborly courtesy; a landowner who quietly acquiesces in the use of a path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the land owner is call upon "to go to law" to protect his right.

Id, at 709. This rationale applies perfectly to the case at hand. The predecessors in interest to Kelly and the Church used of the alleged alley for their own benefit and purposes as well as allowing use by their neighbors. In earlier decades, there was little injury to Respondent's predecessors and great convenience to their neighbors. The use was never adverse then. The law should and does encourage neighborly accommodation by denying a grant of any prescriptive rights because of ongoing neighborly accommodation.

In *Imrie v. Kelly*, Division III recently reiterated this principle, noting that "mere use without permission may not be sufficient to establish adverse use." 160 Wn. App. 1, 5, 250 P.3d 1045 (2010) (Citing *Cuillier*). That case involved a road over a piece of land called the Gaines Property. The Gaines Property was completely fenced in, with gates

blocking access to the road. *Id.* at 5-6. However, between 1951 and 1962 the gates were never locked and the claimant simply used the road without ever asking permission. *Id.* Nevertheless, the court held that the use was a permissive neighborly accommodation. *Id.* at 10.

The court explained that an inference of permissive use arises when a court (as the trial court did in the case at bar) can reasonably infer use permitted by neighborly sufferance. *Id.* at 7-8. (citing *Cuillier* and *Drake).* The *Imrie* summarized the case law and concluded:

> The [*Cuillier*] court explained that where the owner shares the use of the road with claimant, there is an inference of neighborly accommodation.

Id. at 9. Thus the court held that, despite the presence of a gate enclosing the Gaines Property:

> The findings fail to establish that at any time between 1951 to 1961, Mr. Imrie acted in a manner demonstrating a right to use the property without regard to the wishes of the owner. Consequently, the findings here do not support adverse use but, instead, support an inference of neighborly accommodation.

Id. at 10. In *Imrie*, the court noted that a portion of the claimant's property could only be accessed by use of the Gaines road. *Id.* This fact did not alter the inference of permissiveness. As in the present case, where there is shared use of an alleged alley by an owner and neighbors, the claimant

must present additional evidence of adversity beyond mere use without explicit permission. The Dumond failed to do so, making the trial court's inference of permissiveness appropriate here.

ii. Evidence of a relationship between property owners is not necessary to infer permissive use.

In the Brief of Appellant, the Dumonds argues that permissive use can be shown only by evidence of a close friendly or family relationship between the claimant and the owner. Brief of Appellant at 22. This is an incomplete statement of the law. Such circumstances clearly could justify an inference of permissiveness. But there is nothing in the case law to indicate that a close relationship between property owners is a necessary element of establishing permissive use. Any argument to the contrary is plainly contradicted by the Supreme Court's holding in *Cuillier*.

To support their erroneous interpretation, the Dumonds cite to *Granston v. Callahan*, 52 Wn. App. 288, 749 P.2d 462 (1988) and *Drake v. Smersh*, 122 Wn. App. 147. Careful reading of the case does not reveal that a close relationship is the only way to establish permissive use. Reading in a relationship requirement clearly contradicts the Supreme Court's ruling in *Cuillier* and consequently cannot be sustained as a matter of law.

iii. The Dumonds cannot establish a claim of right independent of public use of the alleged alley.

Washington Courts have specifically reconciled cases involving use of another's property by a single neighbor with those involving general public use.

> It is not necessary that the person asserting a right of way by prescription has been the only one using the path, so long as he exercises and claims his right independent of others.

Anderson v. Secret Harbor Farms, 47 Wn.2d 490, 495, 288 P.2d 252 (1955) (citing *Hendrickson v. Sund*, 105 Wash. 406, 410, 177 P. 808 (1919)). In *Anderson*, the owner allowed use by the general public to hunt, fish, and picnic. *Id.* Thus, in order for the claimant to establish a prescriptive easement, he had to establish use of the land which was independent from general public purposes. This burden was found to be met in *Anderson* because, unlike the other users of the land, the claimant used the path to access his property. *Id.*

This holding has been reiterated in recent case law. In *Lingvall v. Bartmess*, 97 Wn. App. 245, 982 P.2d 690 (1999), the court held that explicitly permissive, but infrequent use, by a different neighbor did not create an inference of permissiveness in claimant's use because the two uses were independent. In reaching the decision the Court reiterated that

prescriptive rights can be established despite non-exclusive use, so long as the claimant asserts his right "independent of others." *Id.* at 252.

Here, there is no indication that the Dumonds' use of the property was based on a claim of right different from the mutual consent all neighbors had. There is no indication that the Dumonds or anyone used the alleged alley with any greater frequency, in any different fashion or for different purposes as other neighbors. Since there was no notice to the owners of the Kelly and Church properties of any independent claim of right by Appellants (at least until the way was fenced), there can be no prescriptive easement. Where the use of another's land merely mirrors that of their neighbors, the general public and the city, mere use for the prescriptive period, without more, is insufficient to establish adverse use.

iv. The facts of this case support the trial court's conclusion that use of the land established only a reasonable inference of neighborly accommodation.

The evidence presented by the Dumonds establishes only that most, if not all residents of the block used the alleged alley for a similar purpose in the past. From this fact it is reasonable for the trial court to

infer that the predecessors in interest to Kelly and the Church also used the alleged alley for the same purposes and benefits as the neighbors use.

It is also clear that the alleged alley was used by the city for purposes of collecting refuse from the houses on the block. Such a service would have been of identical benefit to the previous owners of the Church and Kelly properties and the neighbors, and should be presumed to be permissive in the absence of evidence to the contrary. Under these facts use by tacit agreement among the neighbors is a reasonable inference, as found by the trial court.

There is sufficient evidence to show that the Dumonds began using the alleged alley in the same manner as their neighbors, around 1959. Like several others, they built a home with a rear facing garage and used the alleged alley to access their property from the back. But the Dumonds' home was not adjacent to the Kelly or Church properties, and Respondent's predecessor owners had no particular reason to know of the Dumonds' need to use the alleged alley. These owners would have had no way of distinguishing the Dumonds' from any of the other users of the land. With no notice of an independent claim of right asserted by Respondents' to the land, it is reasonable to infer Respondents' previous use was in the same fashion as all other neighbors.

By the time the Respondents allegedly began use following the death of their parents in 2008 (RP 71-72), use of thepassage had virtually extinguished. Even on his infrequent visits to his mother, Appellant Greg Dumond testified that, because of the configuration of the Dumond property, his travel was always to the north, away from Respondents' land. RP 66-67. Of course, for the first time, the way was blocked and permission to pass was withdrawn in 2006. RP 62.

The finding of tacit agreement is a finding of fact which only needs to be supported by substantial evidence. The evidence that none of the neighbors ever questioned the existence of an alleged alley, that they mutually allowed their neighbors to use their property in the same manner as their own use is sufficient to support an inference of permissive use. Under *Cuillier*, and generally established case law, this court should here not substitute its own judgment on this factual question for that of the Superior Court.

v. *Drake* is distinguishable because it involves overt acts of adversity and does not address public use.

The Dumonds rely heavily on *Drake v. Smersh* to argue that there cannot be permissive use in the present case. 122 Wn. App. 147 However, the Court in *Drake* made a fact specific ruling stating that on the record

presented there, no permissive use was found. The *Drake* court clearly held that the court may imply, as here, that neighborly use was permissive, holding:

> In developed land cases, when the facts in a case support an inference that use was permitted by neighborly sufferance or accommodation, a court may *imply* that use was permissive and accordingly conclude the claimant has not established the adverse element of prescriptive easements.

Id. at 153-4 (emphasis in original). The *Drake* Court did little to elaborate on when it is appropriate for a court to imply permissive use, but did frequently refer to permissive use as being the general presumption when evaluating prescriptive claims. (See e.g., *Drake* at page 152. Contrary to the claims of the Dumonds, there is no indication that *Drake* sought to limit the application of an *inference* of permissive use when warranted by the circumstances. The *Drake* court noted this is a fact specific inquiry, and in the case at bar, the trial court found facts to support the presumption of permissive use.

The *Drake* decision is distinguishable from the present case on its facts. In *Drake*, the claimant purchased a vacant lot, which he accessed by means of a driveway located on his neighbors land. *Id.* at 149. This driveway was entirely on his neighbor's property and was used only by that neighbor for purposes of accessing his own property. The claimant

then proceeded to bulldoze an extension of that driveway through his own property and to his house. *Id.* Of course, this changed both the character of the land and its use.

The important fact in *Drake* which distinguish it from this case it that the claimant in *Drake* had constructed a new extension to the driveway without asking permission. *Id.* at 155. This was the first fact cited by the court as evidence of adverse use. *Id.* The claimant in *Drake* did not merely, as here, use an existing passageway in the same manner as the owner. *Drake* expanded the existing driveway for his own purposes. Even though the owner shared use of the driveway with the claimant, the claimant's overt alterations and extension of the existing right of way is indicative of circumstances in which an owner is expect to "go to law" to protect his right to exclusive use.

The Dumonds also cites to *Imrie*, supra, and concludes that because the predecessors in interest to Kelly and the Church did not fence their property, this is somehow more indicative of adversity of use by Appellants. This puzzling argument assumes that fencing the entire property and placing gates on the road is a greater neighborly accommodation than leaving their property open for regular use. Such a conclusion is absurd. The property owner in *Imrie* exerted more control

over his property, and actually took additional measures to prevent access by others. Yet, in *Imrie* the use of the roadway remained permissive, according to the court's findings.

Cuillier, *Roediger*, and *Imrie* explicitly stand for the plain proposition that shared used raises an inference of permissiveness. Thus those cases supply the rule of decision for the present case. Where multiple neighbors all allow shared use of land for their mutual benefit, there is an inference that the use is permissive by tacit agreement. There is abundant evidence of this pre-2006 permissible use in the record. As found by the trial court, Appellants' burden of proving adverse use has not been satisfied.

vi. Subjective belief of a publically owned alley is irrelevant.

It is finally argued that the Dumonds used the property under the belief that it was a public right of way, is evidence of hostility. They cite to *Dunbar v. Heinrich*, 95 Wn.2d 20, 622 P.2d 812 (1980), to support this proposition. However, *Dunbar* specifically does not stand for the proposition that a mistaken belief a road is public right of way entails adverse use. Rather the *Dunbar* court held that:

> adversity is to be measured by an objective standard; that is, by the objectively observable acts of the user and the rightful owner.

Id. at 27. On the specific facts of *Dunbar* a prescriptive easement was granted, but the *Dumbar* court did not hold that use of a road under the belief it is public is evidence of adversity. In fact, *Dumbar* held "that respondent's subjective belief that the property was public was irrelevant." *Dunbar* pg. 23. The Dumonds' claim that they believed the alleged alley to be a public right of way is irrelevant to the outcome of this case. The only thing that matters is the objectively observable acts related to use of the alleged alley. The open and public use of the alleged alley evidences a neighborly accommodation indicative of mutual permissive use.

c. Kelly and the Church are entitled to damages for the destruction of their property by Greg Dumond.

There is no dispute in this case that Greg Dumond destroyed the fences built by Kelly and the Church. This fact was admitted in a declaration submitted to the trial court under oath by Greg Dumond. CP 177. Mr. Dumond also admitted that he lacked permission to destroy the fence, and did so knowing his claim was in dispute. CP 177. The only defense offered for these tortious actions is the claimed existence of a prescriptive easement. Brief of Appellant at 29. The Dumonds also do not

dispute the amount of damages. CP 448. As such the trial court's award of damages in the amount of $2,647.62 can be vacated only if this Court finds that a prescriptive easement exists. As no easement exists, the award of damages must be affirmed.

d. Kelly and Church are entitled to judgment clearing title and a permanent injunction to prevent the Dumonds from using their property.

As with damages, the Dumonds' sole argument that Kelly and Church are not entitled to judgment clearing title and imposition of a permanent injunction is the claimed existence of a prescriptive easement. Brief of Appellant at 28-9. No easement exists, so the judgment and injunction should be affirmed.

e. Kelly and the Church claim attorney fees and costs in defending this appeal from the Superior Court.

Pursuant to RCW 4.84.250, in an action for damages, where the amount pleaded is less than $10,000.00, the prevailing party is entitled to an award of attorney fees as costs. RCW 4.84.290 further provides:

> If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250 . . .
>
> In addition, if the prevailing party on appeal would be entitled to attorneys fees under the provisions of RCW

> 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amounts as the court shall adjudge reasonable as attorneys' fees for the appeal.

Before the lower court, Kelly and the Church counter claimed against the Dumonds for the costs of repairing the fence which was destroyed by Greg Dumond. The damages claimed were $2,647.62, an amount within the purview of RCW 4.84.250. The outcome of this claim was wholly contingent on successfully defending against the Dumonds' assertion of a prescriptive easement. The claim for damages was inseparable inter twined from the defense of the prescriptive use claim. This fact is clearly demonstrated by the current posture of the case before this court. Appellant's sole defense to plaintiff's damages claim is the prescriptive rights assertion. That claim must be defeated before Respondant's damages claim is supportable. Thus, according to RCW 4.84.290, should Kelly and the Church prevail on appeal, they will be the prevailing party under RCW 4.84.250 and entitled to an award of all additional attorney fees incurred during this appeal.

RAP 18.1 (a) and (b) require that this request for attorney fees and costs be included in respondents opening brief.

V. Conclusion

This case presents a classic shared use scenario. Appellants' predecessors initially made use of the land in question in the same manner

as the owner (Respondents and their predecessors), and other neighbors.

There is a prescription of permissive use. In order to distinguish a claim of right, the Appellants must present evidence that their use was distinguishable and independent of others, a fact not found by the trier of fact. Shared use by itself is insufficient to establish adversity. *Imrie*, 160 Wn.2d. 1.

As far as Respondents are concerned, neither visual inspection nor the plat map, title report, or legal description in their deeds established any independent interest of Appellants in Respondents' land.

Appellants argue that, since use had been made of the land for a long period of time, and the way was always the same, prescriptive rights attach. However, the five elements necessary to establish property taking by adverse use are separate and distinct. It is improper to bleed one element of the prescriptive test into another to satisfy an element that has not been satisfied. Until 2006, there was never any assertion by a property owner who seeks to have a dominate estate (Appellants) imposed on the true owner (Respondents). In 2006, the way was blocked – the first objective action that would lead a rational person to believe that permission to use was withdrawn.

The Dumonds have duly presented evidence regarding the use of the land. Their evidence demonstrates only that all property owners on the

block used the alleged alley and it was used by city vehicles for the benefit of all property owners. These facts establish a reasonable inference of shared use, as found by the trial court. Without specific evidence that the predecessors in interest of Kelly and the Church did not themselves use the alleged alley, they have failed to sustain their burden of proving adverse use. Substantial evidence exists in the record for the trial court to make the finding of permissive use.

The issue of permissive use is a question of fact. This Court should not substitute its judgment for that of the trier of fact. Respondents' damages claim is un-rebutted, and attorneys fees should be awarded pursuant to RCW 4.84.250 - 290, and RAP 18.1.

DATED this 31st day of December, 2012.

RUMBAUGH RIDEOUT ADKINS & WALLACE, PLLC

Stanley J. Rumbaugh, WSBA #8980
820 A Street, Suite 220
P.O. Box 1156
Tacoma, WA 98401
Phone: 253-756-0333
Fax: 253-756-0355
Email: stan@rraw-law.com

DECLARATION OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that I served this day the document referenced below to the following, postage prepaid, by first-class mail and by email:

DIANE DUMOND and GREG DUMOND, Appellants v. VIETNAMESE BAPTIST CHURCH OF TACOMA, INC.,a Washington Corporation; and CHARLES L. KELLY AND "JANE DOE" KELLY, as a marital community, Respondents

COURT OF APPEALS DIV. 2

CAUSE NUMBER 43691-1-II

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COPIES TO:

DANIEL N. COOK
c/o FAUBION, REEDER, FRALEY AND COOK, P.S.
5920 100th St. SW. Suite 25
LAKEWOOD, WA 98499

DATED this 2nd DAY OF JANUARY, 2013, AT TACOMA, WA.

Stanley J. Rumbaugh
WSBA # 8980
Attorney for Respondents